SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-416

JOE FRANK MATARAZZO,
Petitioner

vs.

THE STATE OF SOUTH CAROLINA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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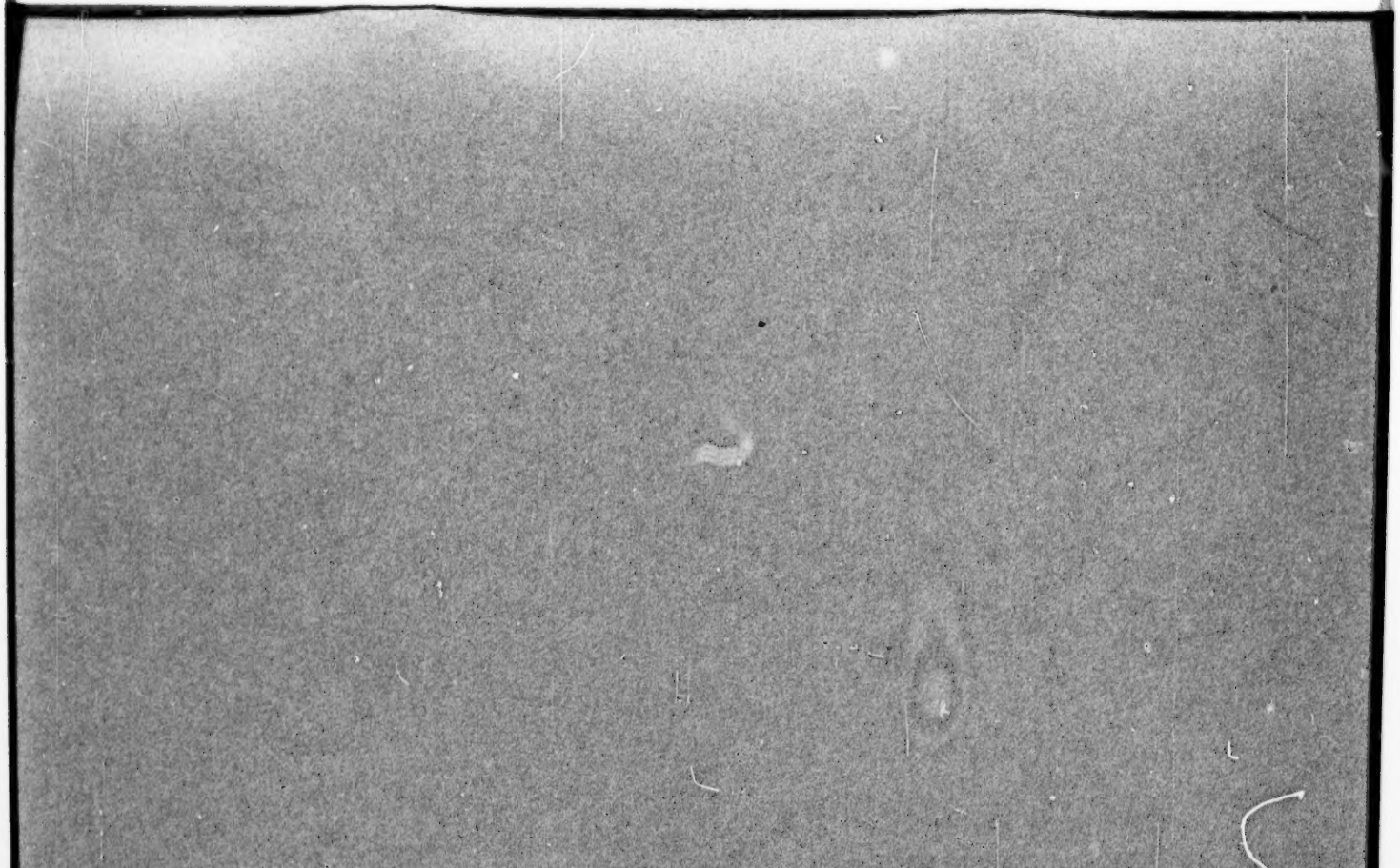

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of South Carolina entered on July 17, 1974.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of the State of South Carolina is reported at 207 S.E. 2d 93 (1974) and is set out in Appendix A hereto, pp. 1a-5a, **infra.**

JURISDICTION

The judgment of the Supreme Court of the State of South Carolina was entered on July 17, 1974, and is set

out in Appendix A hereto, p. 1a-5a, **infra.** Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), petitioner having asserted below and asserting here deprivation of rights guaranteed by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the Trial Court and the Supreme Court of South Carolina misapplied the provisions of the exclusionary rule set down in **Wong Sun v. United States,** 371 U. S. 471, (1963), **Mapp. v. Ohio,** 367 U. S. 643, (1961), **Chimel v. California,** 395 U. S. 752, (1969), and **Ker v. California,** 374 U. S. 23, (1963) by allowing evidence obtained in an invalid incustodial search to be introduced, where there had been no arrest prior to the illegal search.

2. Whether the Trial Court and the Supreme Court of South Carolina denied the defendant Matarazzo due process as guaranteed by the Fourth and Fourteenth Amendments and standardized in **Mapp v. Ohio,** 367 U. S. 643, (1961) and **Wong Sun v. United States,** 371 U. S. 471, (1963) by allowing evidence previously suppressed to be erroneously permitted into evidence and failing to grant a new trial upon a Motion timely made.

3. Whether a waiver of defendant's constitutional guarantee occurred when defense counsel, after having raised an initial objection to evidence and having been overruled, failed to renew this objection each time the identical evidence was offered by the State's witnesses.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth and Fourteenth

Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Laws of South Carolina:

Sec. 32-1510.49 (1971)

32-1510.49. Prohibited acts A; penalties.—(a) Except as authorized by this article, it shall be unlawful for any person:

(1) To manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

(2) To create, distribute, dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Any person who violates this subsection with respect to:

(1) A substance classified in Schedules I or II which is a narcotic drug under § 32-1510.31 (b) and (c) or lysergic acid diethylamide (LSD) shall be deemed guilty of a felony and, upon conviction, shall for a first offense be sentenced to a term of imprisonment for not more than fifteen years or of a fine of not more than twenty-five thousand dollars, or both. For a second offense, or if, in the case of a first conviction of violation of any provision of this subsection, the offender shall previously have been convicted of any violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulent or hallucinogenic drugs, the offender shall be imprisoned for not less than five years nor more than thirty years, or fined not more than fifty thousand dollars, or both. For a third or subsequent of-

fense, or if the offender shall previously have been convicted two or more times in the aggregate of any violation of the laws of the United States or of any state, territory or district relating to narcotic drugs, marijuana, depressant, stimulant or hallucinogenic drugs, the offender shall be imprisoned for not less than fifteen years nor more than thirty years, or fined not more than fifty thousand dollars, or both. Except in the case of conviction for a first offense the sentence shall not be suspended and probation shall not be granted.

(2) Any other controlled substance classified in Schedule I, II, or III shall be deemed guilty of a misdemeanor and, upon conviction, shall for a first offense be sentenced to a term of imprisonment for not more than five years or a fine of not more than five thousand dollars, or both. For a second offense, or if, in the case of a first conviction of violation of any provision of this subsection, the offender shall previously have been convicted of any violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant or hallucinogenic drugs, the offender shall be deemed guilty of a felony and, upon conviction, shall be sentenced to a term of imprisonment for not more than ten years, or fined not more than ten thousand dollars, or both. For a third or subsequent offense, or if the offender shall previously have been convicted two or more times in the aggregate of any violation of the laws of the United States or of any state, territory or district relating to narcotic drugs, marijuana, depressant, stimulant or hallucinogenic drugs, the offender shall be deemed guilty of a felony and, upon conviction shall be sentenced to a term of imprisonment for not less than five years nor more than twenty years, or fined not more than twenty thousand dollars, or both. Except in the case of conviction for a first

offense the sentence shall not be suspended and probation shall not be granted.

(3) A substance classified in Schedule IV shall be deemed guilty of a misdemeanor and, upon conviction, shall for a first offense be sentenced to a term of imprisonment for not more than three years or a fine of not more than three thousand dollars, or both. In the case of second or subsequent offenses, the sentence shall be twice the first offense.

(4) A substance classified in Schedule V shall be deemed guilty of a misdemeanor and, upon conviction, shall for a first offense be sentenced to a term of imprisonment for not more than one year or a fine of not more than one thousand dollars, or both. In the case of second or subsequent offenses, the sentence shall be twice the first offense.

(b) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to a valid prescription or order of, a practioner while acting in the course of his professional practice, or except as otherwise authorized by this article.

Any person who violates this subsection with respect to:

(1) A controlled substance classified in Schedule I or II which is a narcotic drug under § 32-1510.31 (b) and (c) or lysergic acid diethylamide (LSD) shall be deemed guilty of a misdemeanor and, upon conviction, shall be imprisoned for not more than two years or fined not more than five thousand dollars, or both. For a second offense the offender shall be guilty of a felony and, upon conviction, shall be imprisoned for not more than three years or fined not more than five thousand dollars, or both. For a

third or subsequent offense the offender shall be deemed guilty of a felony and, upon conviction, shall be imprisoned for not more than four years or fined not more than ten thousand dollars, or both.

(2) Any other controlled substance classified in Schedules I through V shall be deemed guilty of a misdemeanor and, upon conviction, shall be imprisoned for not more than six months or fined not more than one thousand dollars, or both. For a second or subsequent offense the offender shall be deemed guilty of a misdemeanor and, upon conviction, shall be subject to imprisonment for not more than one year or a fine of not more than two thousand dollars, or both, except as provided in subsection (3);

(3) Possession of more than ten grains of cacaine, one hundred milligrams of alpha- or beta-eucaine, four grains of opium, four grains of morphine, two grains of heroin, one hundred milligrams of isonipecaine, twenty-eight grams or one ounce of marijuana, ten grams of hashish or more than fifty micrograms of lysergic acid diethylamide (LSD) or its compounds shall be prima facie guilty of violation of subsection (a) of this section. Provided, however, that any person who violates this subsection with respect to twenty-eight grams or one ounce or less of marijuana or ten grams or less of hashish shall be deemed guilty of a misdemeanor and, upon conviction, shall be subject to imprisonment for a term not to exceed three months or a fine not to exceed one hundred dollars, or both. For a second or subsequent offense the offender shall be deemed guilty of a misdemeanor and, upon conviction, shall be subject to imprisonment for not more than six months or a fine of not more than two hundred dollars, or both.

When a person is charged under this subsection

for possession of controlled substances, bail shall not exceed twice the amount of the fine. (1971 (57) 800. 2056).

32-1510.31. Schedule I . . .

(d) Any material, compound, mixture or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation . . .

10. Marijuana . . . (1971) (57) 800).

STATEMENT

This is a petition for writ of certiorari to review the judgment of the Supreme Court of South Carolina, entered July 17, 1974, affirming petitioner's conviction and sentence to hard labor for two years by the Trial Court of Hampton County, South Carolina. Notice of Appeal was timely filed with said Court and the Supreme Court of South Carolina on July 17, 1974 affirming the Trial Court.

Petitioner, a young married man, was arrested on April 30, 1973 and was indicted on June 4, 1973 and charged with the offense of possession of a controlled substance (marijuana) and possession of a controlled substance (marijuana) with the intent to distribute the same. Defendant was indicted along with two other defendants for the same crimes. Defendant Matarazzo presented a Petition for Severence, since he was not present at the time of the search nor the ar-

rest of the co-defendants, but was later arrested on a warrant. This Motion was denied. (TR5-8).

On June 4, 1973, defendant made a Motion in the Circuit Court of Hampton County, South Carolina to suppress three bags of marijuana found in the bathroom, one bag of marijuana discovered under a sofa and one smoking pipe in plain view on the floor of the living room of his residence, a mobile home. On June 5, 1973, the Motion to Suppress was granted as to the three packages of marijuana which had been seized from the defendant's bathroom. The grounds being that the search under which said items were seized was void in that the search warrant under which said items were seized was void. The search warrant had not been issued on probable cause shown to the issuing magistrate. (TR48). The Motion was denied as to the fourth package of marijuana and the smoking pipe which were seized from the living room area of the defendant's trailer on the grounds that said items were seized pursuant to a lawful arrest and were not seized pursuant to an illegal search. Chief Pope's testimony is (a) the police entered the trailer by the living room door; (b) saw a smoking pipe on the floor; (c) proceeded to search the entire premises starting with the bathroom; (d) "This one pack (under the sofa) that we found was where the pipe was, three or four feet of the pipe, now we found it after we found three packs that was inside the bathroom underneath the tub." (TR31-32). The marijuana discovered under the living room sofa was discovered as a result of an illegal search warrant and therefore, all should have been suppressed.

On June 5, 1973, the defendant Matarazzo was

brought to trial alone on both counts of the aforesaid indictment, after the co-defendants chose at the last moment to plead guilty. The evidence shows the following: On April 27, 1973, police officers obtained a search warrant to search the house trailer where the defendant Matarazzo lived with two other individuals, Willie Mayes, a 14 year old and Russell Curl, age 21. When the police arrived at the trailer with the warrant, they sent their informer to the trailer to make a purchase of marijuana. He returned and advised that Russell Curl had told him that there was stuff there but that he could not sell it, it was not his and that if he would return in fifteen minutes, Willie (Mayes) would be there and would sell it to him. The officers did not wait but went to the trailer, knocked on the door and after someone said "Come in," they entered, read the search warrant and proceeded to search the trailer. (TR-30-32, 46, 62). In the bathroom they discovered three plastic bags containing marijuana under the bathtub. They then proceeded back into the living room of the trailer where they continued their search and discovered an additional bag of marijuana under a couch. At the time the police entered into the trailer, Willie Mayes was not present. "We did not wait on Willie . . ." (TR30-31). However, the police discovered the marijuana under a sofa on which Willie Mayes was sitting; Willie Mayes was present when the police arrested Curl. (TR-33, 35, 36) (The transcript shows that some time had elapsed before the police placed Russell Curl under arrest, and during this time the police were searching pursuant to the illegal search warrant and not pursuant to a search incident to an arrest.) At the time of their entry into the trailer, in which eleven persons were present, the officers ob-

served a smoking pipe and smelled the odor of burning marijuana. (TR30, 32, 46, 62). There were three or four persons, including Willie Mayes who were seated on the couch in the room under which the one package of marijuana was discovered. (TR33)

Defendant Matarazzo was not present during the search on April 27, 1973, and was later arrested on Monday, April 30, 1973. (TR58-59). During the trial, the only testimony connecting Matarazzo with the marijuana was that of Willie Mayes and Russell Curl. Mayes testified substantially that he found the marijuana a few days before the arrest, that he sold the marijuana, that he got the money for the sales, that he was the only one who sold it, and he was the only one who got the money, that it was his marijuana, that it was not the defendant Matarazzo's and that the defendant did not know that he was selling it. (TR72-74). The testimony further revealed that the defendant was not present at the time of the illegal search nor was he present at the time of the arrest of the co-defendants (TR33, 34, 35, 58). Co-defendant Russell Curl also testified that the defendant knew that the marijuana was on the premises. (TR83-85).

During the testimony of the co-defendants and an expert witness for the State, their testimony about the three bags of marijuana being found in the bathroom was allowed into evidence, over the objection of Matarazzo's counsel. The Trial Court allowed this testimony into evidence on the theory that this evidence was obtained by an independent source. (TR66, 67, 68).

At the close of all the evidence and while the jury was out and piror to the charge to the jury, the Court

ruled that the only marijuana in evidence was nine grams. The Court further stated that it would not charge on the presumption that one in possession of more than 28 grams is presumed to have it for the purpose of distribution. (TR121). The Court did allow testimony of Willie Mayes and Russell Curl to the effect that the defendant knew that four bags of marijuana were on the premises and was therefore constructively in possession thereof. The Court also stated that the testimony of Mayes and Curl could go to the jury for whatever use they wished to put to it. (TR121).

The defendant was convicted on both counts of that indictment, and upon instruction of the Trial Judge, the jury modified its verdict, finding the defendant guilty of possession of a controlled substance (marijuana) with the intent to distribute the same. Defendant's attorney moved for Judgment notwithstanding the verdict and Motion for New Trial (TR139). The defendant was sentenced to be confined at hard labor upon the public works of Hampton County or the State Penitentiary for a period of two years. (TR140). Notice of Intention to Appeal was served June 13, 1973.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner raised, **inter alia,** the three federal constitutional claims presented in this petition for writ a certiorari upon trial, in all subsequent Appellate procedures, and particularly in his Exceptions and in his Brief to the Supreme Court of South Carolina.

As to Question 1, petitioner raised by pretrial mo-

tion to suppress (Exception 1) and by objection (TR27-49) and he argued in the Supreme Court of South Carolina: "The Trial Court erred in refusing to suppress from evidence one package of marijuana and one smoking pipe upon defendant's timely motion to suppress these items."

Petitioner raised Question 2, by timely objecting (TR65-68; TR94) to the testimony of witness Willie Mayes (TR65) and witness Grady A. Layton (TR94) concerning the three packages of marijuana which previously had been suppressed from evidence, (Exception 2 and 3), which objections the Supreme Court of South Carolina held were without merit.

Question 3 was raised by the Supreme Court of South Carolina by its failure to properly apply the principles set down in **Wong Sun v. United States**, 371 U. S. 471.

ARGUMENT AND LAW

I

THE TRIAL COURT AND THE SUPREME COURT OF SOUTH CAROLINA MISAPPLIED **WONG SUN V. UNITED STATES, MAPP V. OHIO, CHIMEL V. CALIFORNIA,** AND **KER V. CALIFORNIA** AND THE EVIDENCE OBTAINED BY AN ILLEGAL AND UNCONSTITUTIONAL SEARCH AND SEIZURE WAS ADMITTED IN EVIDENCE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

Petitioner's rights under the Fourteenth and Fourth

Amendments to the Constitution were violated by the State of South Carolina by the trial court allowing the introduction of the one bag of marijuana at his trial and by the South Carolina Supreme Court's affirming of the allowance of the one bag of marijuana at the trial on the grounds that it had been taken as an incident to a lawful arrest from under a couch in petitioner's home. The police officers had gained entry into the trailer by producing a search warrant (TR62), which the trial court ruled to be invalid, clearly all of the "contraband" searched for and seized under the guise of this warrant would not be admissable in evidence against the defendant and all the marijuana should have been suppressed. If the search here is to be found legitimate, it must be as a valid search incident to and after a lawful arrest under **Chimel v. California,** 395 U. S. 752 (1969). You cannot have an incustodial search of the premises, prior to the lawful arrest of the defendant.

An arrest upon cause to arrest, without antecedant justification, will justify only a search of the person of the arrestee and search of instrumentalities, contraband, or evidence which is in plain view at the place of the arrest, and the defendant was arrested on Monday (April 30, 1973) at the police station (TR5-8). The record clearly shows that there was no arrest until after the search had been completed (TR62, TR32). **Katz v. United States,** 389 US 347, **Stoner v. California,** 376 US 483, **Jones v. United States,** 357 US 493, Miller **v. United States,** 357 US 301, **McDonald v. United States,** 335 US 451, **Johnson v. United States,** 333 US 10, **Trupiano v. United States,** 334 US 699, **Go-Bart Importing Co. v. United States** 282 US 344. **Weeks v. United States,** 232 US 383.

The one package of marijuana and the smoking pipe introduced in evidence by the State should have suppressed by the trial court inasmuch as these items were unlawfully obtained by the police as a result of an illegal search and seizure, contrary to both the provisions of the state and federal constitutions. The search and seizure of such evidence was illegal and the search of the premises and the subsequent seizure therefrom were the direct results of a general search of the premises under the pretext of a search warrant. The police officers, upon entering the premises, read a search warrant to Russell Curl (TR34) which was subsequently declared void and illegal by the trial court (TR48); the officers commenced to search the entire premises, they discovered marijuana under the bathtub; returning to the living room, they looked under the couch and seized the one pack of marijuana in question before this court (TR32). Under this factual situation, it is apparent that the package of marijuana seized from underneath the couch, was discovered and seized pursuant to a general search of the premises conducted under the void and illegal search warrant, and was not incidental to the arrest of Russell Curl. The inescapable conclusion follows that this package of marijuana should have been suppressed for the same reasons the trial court properly suppressed the three bags of marijuana found beneath the bathtub. There was no evidence whatsoever presented to indicate that the police officers had any other purpose than to execute the search warrant, which was later declared to be void and illegal. Therefore, the exclusionaly rule should apply to all of the marijuana so discovered.

II

THE TRIAL COURT AND THE SUPREME

COURT OF SOUTH CAROLINA DENIED PETITIONER EQUAL PROTECTION AND DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AND FOURTH AMENDMENTS.

During the trial of the case, the State procured testimony from co-defendant Willie Mayes concerning the three packages of marijuana which had been previously suppressed by the court; defense counsel objected to this testimony and the trial court overruled the objection stating that the invalidity of the search warrant would not prevent the State from proving through an independent source the quantity of marijuana on the premises at the time (TR65-66). The South Carolina Supreme Court affirmed this decision of trial court allowing the testimony of co-defendant Mayes as to the quantity of marijuana contained in the premises to go to the jury. The inescapable fact is that there was an illegal search, the consequence of which there was the obtaining of illegal evidence and illegal testimony of a co-defendant, not an independent source. The matters testified to were illegally seized and the evidence should have been suppressed and excluded **People v. Albea,** 2 Ill. 2d 317, 118 N.E. 2d 277, **People v. Cruz,** 61 Calif. 2d 861, 395 P. 2d 889. Subsequently, the State sought to introduce similar evidence from Grady L. Layton concerning the weight of the four bags of marijuana when only one package was in evidence (TR94). At this point, counsel for the defendant again objected and additionally moved for a mistrial, the objection and motion for mistrial were denied (TR94-TR98). Petitioner contends that such action by the trial court and the affirmance by the Supreme Court of South Carolina effectively nullified

the "exclusionary rule" as set forth in **Mapp v. Ohio,** 367 US 343 (1961), and as expanded to the "fruits of the poisonous tree" by **Wong Sun v. United States,** 371 US 471 (1963).

Virtually every court that has considered the question has held that when a search is illegal, all evidence whether found or seen is incompetent against the accused, **Tide v. The State,** 233 Ind. 594, 122 N.E. 2nd 343, **Dowlat v. State,** 235 N.E. 2d 173, (Ind. 1968), **Ross v. Commonwealth,** 275 S.W. 2d 424, **Acuna v. State,** 54 So. 2d 256 (1951), **Smith v. The State,** 182 Tenn. 158, 184 S.W. 2d 390. In **McGinnis v. United States,** 227 F. 2d 598 (1955), the court held "we find no basis in the cases or in logic for the distinguishing between the introduction into evidence of physical objects illegally taken and the introduction of testimony concerning objects illegally observed." The rule against the use of evidence obtained by an unreasonable and illegal search and seizure cannot be circumvented by the indirect use of such evidence against the defendant. The attempt to introduce into evidence testimony of a co-defendant under the guise as evidence as an independent source is unreasonable and untentible. **Goldstein v. United States,** 316 US 114. Evidence is inadmissable under the exclusionary rule not only when obtained during an illegal search, but also if derived from information gained in that illegal search. **United States v. Krulewitch,** 167 F. 2d 943.

In **Silverthorne Lumber Company v. United States,** 251 US 385, (1920), Justice Holmes States in his opinion:

The essence of provision forbidding the acquisi-

> tion of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.

The testimony of witness Mayes falls into the category of "fruit of the poisonous tree." **Wong Sun v. United States**, 371 US 471, (1963). Mayes' testimony was clearly derived from the exploitation of the illegal search of the premises.

The question involving the use of testimony concerning an object which is itself inadmissable in a criminal prosecution appears to be a novel one in the State of South Carolina. A thorough search of the law reveals no case in point in that jurisdiction. However, that court recognized that evidence obtained as the result of an illegal search and seizure is inadmissable as evidence in a criminal prosecution. **State v. Hill**, 245 S.C. 76, 138 S.E. 2d 829 (1964), **State v. Daniels**, 252 S.C. 591, 167 S.E. 2d 621 (1969), **State v. Hamilton**, 251 S.C. 1, 159 S.E. 2d 607 (1968), **State v. Easterling**, 257 S.C. 239, 185, S.E. 2d 366 (1971). In **State v. Hill, supra.**, the court stated:

> If there was an illegal search and seizure, the fruits thereof would, of course, be inadmissable in state proceedings under the rule laid down in **Mapp v. Ohio**, 367 U.S. 643. The search warrant being a nullity, the incriminating evidence . . . was obtained as the result of an unconstitutional search and seizure.

While in **State v. Baker**, 251 S.C. 108, 160 S.E. 2d 556 (1968), the Court ruled as to the admissibility of evidence obtained by means of a stale search warrant and was of the opinion that all evidence so obtained should have been excluded.

The crux of this is that but for the illegal search of the premises and discovery of the four packages of marijuana, Willie Mayes would not have been arrested thereby enabling the State to procure his testimony as to the marijuana in exchange for a bargained plea. Clearly, his testimony was the fruit of an illegal search and seizure and in fact directly obtained therefrom. "If phlsical objects are subject to a motion to suppress, testimony describing such objects should also be suppressed." 22A C.J.S. 173 Criminal Law Section 657(25), 1973 Pocket Part.

There was no evidence other than co-defendant Mayes which established or tended to indicate that the defendant had any intent to distribute the marijuana or that he even knew that anyone else intended to distribute it.

It is of interest to note that the trial court stated that it would not charge the statutory presumption that one in possession of more than twenty-eight grams is presumed to have it for the purpose of distribution and instructed the State not to argue such presumption (TR121). Without such presumption, there was no evidence presented by the State to support a jury finding of the requisite "intent to distribute," and defendant's conviction for "possession of marijuana with intent to distribute." A conviction, without evidence to support it cannot stand and it is contrary to law and requires a new trial. **State v. Hampton,** 79 S.C. 179, 60 S.E. 669.

III

THE COURT BELOW HAS MISAPPLIED THE STANDARDS OF MAPP V. OHIO, AND HAS THEREBY DENIED PETITIONER A FAIR TRIAL.

The Supreme Court of the United States has recognized in the opinion of **Mapp v. Ohio**, 367 US 643 (1961), that in determining whether a State criminal conviction is constitutionally permissable because of the admission of evidence obtained through an illegal search or seizure, state procedural requirements concerning assertion and persistence of direct and collateral constitutional challenges to criminal conviction must be respected . A general procedural requirement, both in the State Court and in the Federal Court is that if a defendant wishes to preserve his right to challenge on an Appeal, the constitutionality of a search and seizure through which certain evidence has been obtained, he must take timely steps in the lower court, either through a Motion to Suppress the Evidence or through a sufficient objection when the evidence is offered at the trial to let it be known that he objects to the use of the evidence on the ground that it has been obtained either through an unreasonable search and seizure or that the evidence was obtained in an invalid, incustodial search prior to the search. The South Carolina Supreme Court erred in affirming the lower court's ruling on the grounds that the defendant failed to impose no further objection to the pipe and the one bag of marijuana when it was offered in the trial of the case and by not continuing to object to Mayes and Layton's testimony. The raising of the exclusionary rule at the Motion to Suppress

hearing invoked the Mapp doctrine and there was no waiver of the constitutional rights.

CONCLUSION

Petitioner respectfully prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Petition for Writ of Certiorari upon respondent by placing a copy of same in the United States mail, certified mail, return receipt requested, in an envelope with sufficient postage and properly addressed to:

Mr. Randolph Murdaugh, Jr.
Solicitor of the Fourteenth Judicial
Circuit of South Carolina
Post Office Drawer 457
Hampton, South Carolina 29924

Mr. Joseph R. Barker
Staff Attorney
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Post Office Box 11549
Columbia, South Carolina 29211

Miss Frances H. Smith, Clerk
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

This 11th day of October, 1974.

Of Counsel for Applicant

Post Office Box 786
Savannah, Georgia 31402

APPENDIX

[2] The common-law theory of unity or identity of the spouses and the disability of coverture, insofar as they affect litigation have long since been completely abolished in this jurisdiction. Section 10-216 of the Code reads as follows: "Action by and against married woman.—A married woman may sue and be sued as if she were unmarried. When the action is between herself and her husband she may likewise sue or be sued alone." This Code section had as its genesis an Act of the General Assembly, 1870 (14) Section 137, and was last amended in 1925, now nearly 50 years ago. In the case of Bryant v. Smith, et ux., 187 S.C. 453, 198 S.E. 20, the Court had occasion to review a number of our Married Women's Emancipation or Enabling Acts, including the Code section above quoted, then part of Section 400 of the 1932 Code, and concluded its review with the following language:

"As the result of these successive legislative steps in the direction of a larger liberty and a corresponding responsibility, we think that the law of servitude in marriage is repealed in this State. An analysis of the broad and comprehensive language of Sec. 400 shows that the legislature meant to complete the work of emancipation, and to give married women all the rights and remedies possessed by unmarried women, and to subject them to all of the laws of the State, without reference to the marital relation."

[3] Under the law of this jurisdiction it is clear that respondent was under no disability as a result of her coverture and the statute of limitations has no saving clause in her favor. But, even if coverture constituted a disability, her claim would still be barred by the statute of limitations because her right of action accrued long before her coverture. Section 10-105 of the Code reads as follows: "Disability must exist when right accrued.—No person shall avail himself of a disability unless it existed when his right of action accrued."

[4] Regarding the argument advanced by the respondent, and some courts, that as a matter of public policy a statute of limitations should not run during marriage because domestic discord would be promoted if a wife, in order to protect her rights, were compelled to bring action against her husband, we regard the establishment of any such exemption or exception to our statutes of general application to be, if per chance advisable, a legislative and not a judicial function. Cf. In re Crawford's Estate, 155 Kan. 388, 125 P.2d 354. It being clear to us that the respondent's claim, here in issue, is barred by the statute of limitations, the judgment of the court below, insofar as it holds to the contrary, is hereby,

Reversed.

MOSS, C. J., LEWIS and LITTLEJOHN, JJ., and E. HARRY AGNEW, Acting Associate Judge, concur.

The STATE, Respondent,

v.

Joe Frank MATARAZZO, Appellant.

No. 19864.

Supreme Court of South Carolina.

July 17, 1974.

Defendant was convicted in the General Sessions Court, Hampton County, W. L. Rhodes, Jr., J., of possession of a controlled substance with intent to distribute and he appealed. The Supreme Court, Bussey, J., held that evidence sustained the conviction; that defendant was not entitled to mistrial on basis of witness' testimony which referred to suppressed evidence, where defendant had not objected to prior witnesses' testifying to the same fact; and that defendant was not entitled to new trial on

...si prejudicial remarks of the prosecutor.

Affirmed.

1. Criminal Law ⇐741(1), 753.2(3)

When a motion for a directed verdict is made, the trial judge is concerned with the existence or nonexistence of evidence, not with its weight, and, although he should not refuse to grant such motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there is any evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced.

2. Drugs and Narcotics ⇐117

Evidence that marijuana was found in trailer in which defendant and two others lived, that all persons participating in "pot party" were known to, and were friends of, all of the occupants of the trailer, including defendant, and that the marijuana was the property of all three occupants of the trailer and defendant's admission that he knew that parties had taken place at his trailer, although he did not know that they were pot parties, sustained defendant's conviction for possession of a controlled substance with intent to distribute.

3. Property ⇐10

Articles in a dwelling are deemed to be in the constructive possession of the person controlling the dwelling.

4. Criminal Law ⇐1031(1)

Objections that seizure of the evidence was illegal, that probable cause for arrest was nonexistent, and that seizure of the articles did not result from search incident to a lawful arrest could not be raised for first time on appeal.

5. Criminal Law ⇐1036.1(4)

Contention that the incriminating testimony would not have been made available to the State but for an illegal search and that testimony was thus the fruit of the poisonous tree was not available on appeal where not made in trial court.

6. Criminal Law ⇐867

Where two witnesses had testified to amount of marijuana found in defendant's trailer without any objection from defendant that the evidence was the result of an illegal search, it was not error to overrule defendant's motion for mistrial based on similar testimony by a third witness.

7. Criminal Law ⇐919(5)

Where record showed that defendant only objected on one occasion to prosecutor's remarks to the jury and that court instructed the jury to disregard the remark objected to, the defendant was not entitled to a new trial on the basis of allegedly prejudicial remarks.

Luke N. Brown, Jr., J. Harold Mayer, Jr., Ridgeland and Alexander L. Zipperer, III, Smith & Portman, Savannah, Ga., for appellant.

Sol. Randolph Murdaugh, Jr., and Asst. Sol. Randolph Murdaugh, III, Hampton, for respondent.

BUSSEY, Justice:

At the June, 1973, term of the Court of General Sessions for Hampton County, the appellant Matarazzo was convicted of the offense of possession of a controlled substance (marijuana) with intent to distribute the same. He appeals from his conviction and resulting sentence to a two year term of imprisonment. He states and argues four questions on appeal and we shall first consider his contention that the evidence in the case was insufficient to support his conviction.

[1] It is elementary that in deciding whether the court erred in failing to direct

...vor of a defendant in a crimi... case the appellate court is required to view the testimony in the light most favorable to the State. When a motion for a directed verdict is made the trial judge is concerned with the existence or non-existence of evidence, not with its weight, and although he should not refuse to grant such motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury, if there is any evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. See numerous cases collected in West's South Carolina Digest, Criminal Law ⇐741(1), 753(2).

[2] We accordingly review and state the evidence in the light most favorable to the State. Appellant, then 20 years of age, in February, 1973, rented a trailer which became his abode in Hampton, South Carolina. Before coming to Hampton he had been a resident of Savannah, Georgia for the previous 16 years. He was employed by the Georgia-Pacific Company working on a job from late afternoon until about 2:30 a. m., five days a week. Living in appellant's trailer with him was one Russell Curl, age 19, a former employee of appellant in forestry work, and a 14 year old Negro boy, one Willie Mays. Neither Mays nor Curl were employed at the time of the alleged offense, both being non-paying guests in appellant's trailer home.

On Friday night, April 27, 1973, five law officers, including the Chief of the Hampton Police Department, acting on information from an informant, went to the appellant's trailer, knocked upon the door and were invited in. As the officers entered there were eleven per ons in the living room of the trailer, Curl, Mays, and nine others who ranged in age from 13 to 18 years. A warm pipe was lying on the living room floor and the officers, one or more of them being familiar therewith, smelled burning marijuana. The appellant was at work and not present at the pot party. Curl who was known to the officers as an occupant of the trailer was promptly arrested. Mays, not known to the officers to be an occupant of the trailer, was later arrested as was the appellant.

The officers were armed with a search warrant, later ruled to be invalid, and in the course of a search of the trailer they found three bags of marijuana in the bathroom under the bathtub and a fourth bag underneath the couch in the living room near the spot where the pipe was found. Upon a motion to suppress, the three bags of marijuana found in the bathroom were excluded from the evidence, with only the bag found under the couch being admitted into evidence. There was other evidence, however, as will hereinafter appear, that four bags of marijuana were in the trailer at the time of Curl's arrest. These four bags had been in the trailer for several nights and their presence therein was know to the appellant. Both Mays and Curl testified that appellant knew of the presence of the marijuana, but denied that such was the property of the appellant. At one point, however, Mays in response to a leading question by the solicitor testified to the effect that the marijuana was the property of all three occupants of the trailer. At least one sale of $5.00 worth of marijuana was made by Willie.

The nine teen-agers who were attending the pot party as guests when the raid occurred were known to, and friends of, all three occupants of the trailer. The circumstances reflected by the evidence give rise to the inference that this was not the first party to be held at the trailer. At some time prior to the night of the raid, the chief of police went to the trailer and removed therefrom two 13 year old girls. Appellant was admittedly present at that time but contended that he was asleep and didn't know what the girls were doing there. Appellant admitted that he knew parties had taken place at his trailer but denied any

...at they were not parties or ...at any children were participating therein.

[3] Ordinarily articles in a dwelling are deemed to be in the constructive possession of the person controlling the dwelling. See 22A C.J.S. Criminal Law § 597, p. 379. See also the annotation in 91 A.L.R.2d 810, dealing particularly with possession and/or constructive possession in drug cases. There is abundant evidence, we think, to prove at least constructive possession of marijuana by the appellant and indeed his brief tacitly so concedes. Viewing the evidence in the light most favorable to the State we conclude that under all of the circumstances a fair and logical deduction therefrom is that such possession on the part of the appellant was with the intent to participate directly or indirectly in the distribution thereof. It follows that the trial court correctly denied appellant's motion for a directed verdict of not guilty.

[4] Appellant next contends that the trial court erred in refusing to suppress and exclude from the evidence the smoking pipe and the one package of marijuana which was found underneath the couch. It is argued that the seizure of such evidence was illegal for two reasons: (1) that probable cause for arrest was nonexistent, and (2) the seizure of these articles did not result from a search incident to a lawful arrest but was the direct result of a general search of the premises in the course of the execution of a void search warrant. The record discloses that neither of these contentions was presented to the court below and accordingly they may not be appropriately raised for the first time on appeal.

It is true that counsel for appellant in his motion to suppress sought to suppress all of the evidence, but discussed what portion of the evidence, if any, might under the law be admissible because discovered and seized in the course of a search incident to a lawful arrest. In summing up his contentions, counsel conceded that the court might find that there was a valid search, incident to a lawful arrest and moved that in the event of the court so finding, all evidence not found in the room of the arrest be suppressed. Thereafter the court heard, at length, evidence for the State as to the circumstances surrounding the arrest of Curl and the search of the apartment; no evidence being offered by the appellant. The court then ruled that the search warrant was invalid and further ruled that the marijuana found in the bathroom would be excluded, but that the evidence seized in the living room, the point of arrest, would be admitted. While His Honor did not so expressly state, it is obvious that after hearing the evidence, His Honor concluded that there was a lawful arrest of Curl and, incident thereto, a lawful search of the room in which the arrest occurred. We add that the record rather clearly shows that his conclusion in this respect was correct. Counsel for appellant, after hearing the evidence and the ruling, was obviously satisfied therewith and interposed no further objection to the pipe and one bag of marijuana found in the room of arrest. He not only did not object, but expressly stated that he had no objection thereto.

Appellant next contends that the court erred in allowing testimony concerning the three bags of marijuana which had already been ordered suppressed. Without any reference to the search by the officers, Willie Mays and later Curl, testified that there were four bags of marijuana in the trailer at the time of the raid by the officers.

[5] There are a number of reasons why appellant's contention in this respect is totally without merit. The testimony of Mays was objected to, but he was thereafter cross-examined by appellant's counsel without any reservation of rights under the objection. No objection was interposed to the testimony of Curl. He does not now assert error as to the admission of the testimony of Curl, the crux of his contention being simply that but for the illegal search

- premises, Willie Mays would never have been arrested and his incriminating testimony as to the existence and quantity of marijuana never been made available to the State. In brief, such testimony was the fruit of "the poisonous tree". The shortest and simplest answer to this contention is that such was never made to nor passed upon by the court below.

The record shows that when Mays was asked how much marijuana was in the trailer that night he responded, "I guess it was four bags." Counsel objected stating simply that the allowance of such testimony would defeat the entire purpose of the exclusionary rule, the three bags of marijuana found under the invalid search warrant having been previously suppressed. The court ruled, in effect, that the invalidity of the search warrant would not prevent the State from proving through an independent source, if it could, the quantity of marijuana in the premises at the time. Counsel did not even suggest to the court the possibility of the testimony of Mays being other than from an independent source. Even had the issue, which he now raises, been precisely raised when the testimony of Mays was objected to, the record is insufficient to support appellant's present contention. The record does indicate that the State had available considerable evidence against Mays other than any marijuana found as the result of an invalid search warrant. Most probably only Mays himself knows, and the record does not show, exactly why he decided to plead guilty and testify for the State.

In this same connection, in the course of the examination of Mr. Layton, a chemist for SLED, the solicitor asked and Mr. Layton answered a question as to the approximate weight of four packages of marijuana similar to the one package which was in evidence. Upon objection by counsel the jury was excused. Counsel then, and for the first time, contended to the court that any testimony as to four bags of marijuana would under the circumstances of the case be the fruit "of the poisonous tree" and accordingly excluded under the principle enunciated in Wong Sun v. United States 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 The solicitor agreed not to pursue this line of questioning with Layton, following which the court ruled the question out of order. Counsel for appellant then moved for a mistrial on the ground that there were several references to the four bags of marijuana, which were so prejudicial to his client as to require a mistrial. No request was made for any further or precautionary instruction with respect to the objection made to the testimony of Layton and sustained by the court. Neither was there a motion to strike any of the evidence as to the four bags.

[6] The motion for a mistrial was properly denied. Mr. Layton was the last witness for the State and even assuming, without at all deciding, that the objection to his testimony was meritorious, such was sustained. At that stage of the trial two witnesses had already testified, without any proper objection thereto, that there were in fact four bags of marijuana in the trailer. Moreover, the record does not reflect, we think, any meritorious ground for excluding such evidence even if timely objected to.

[7] Finally, the appellant argues that he is at least entitled to a new trial because of alleged prejudicial remarks of the solicitor to the jury in the course of argument. This contention is clearly without merit. The records show that in only one instance did counsel for appellant object to any remark by the solicitor which objection was sustained, the court instructing the jury to disregard the remark objected to.

We conclude that all of the appellant's objections are without merit and the judgment below is accordingly,

Affirmed.

MOSS, C. J., and LEWIS, BRAILSFORD and LITTLEJOHN, JJ., concur.

THE SUPREME COURT OF SOUTH CAROLINA

The State, Respondent,

v.

Joe Frank Matarazzo, Appellant.

ORDER

Attorneys for appellant have filed Motion for Stay pending a final determination of an appeal to the United States Supreme Court. It is therefore ordered that the remittitur in this case be stayed and the execution of the sentence of the appellant be stayed for a period of ninety (90) days from July 17, 1974. Upon receipt of notice from the Clerk of the United States Supreme Court that an appeal in behalf of the appellant has been docketed in that Court the stay shall continue until the final disposition of the case by the Supreme Court of the United States.

Joseph R. Moss, Chief Justice
For the Court

Columbia, South Carolina
July 29, 1974

RECEIVED
JUL 30 1974
S. C. SUPREME COURT

CERTIFIED TRUE COPY
Clerk, S. C. Supreme Court

STATE OF GEORGIA]
]
CHATHAM COUNTY]

Before the undersigned Notary Public, an officer authorized by law to administer oaths, came and appeared THOMAS J. MAHONEY, JR., who being sworn says:

Affiant is an Attorney at Law, admitted to practice in the Courts of South Carolina and Georgia, including the Supreme Court of South Carolina.

Affiant has requested the Clerk of the Supreme Court of South Carolina to furnish a certified copy of the record in the case of The State v. Joe Frank Matarazzo for use in this petition for writ of certiorari.

Thomas J. Mahoney Jr.
Thomas J. Mahoney, Jr.

Sworn to and subscribed before
me this 8th day of October, 1974.

Notary Public, Chatham County, Georgia

THE SUPREME COURT OF SOUTH CAROLINA

The State — Respondent,

V.

Joe Frank Matarazzo, — Appellant.

ORDER

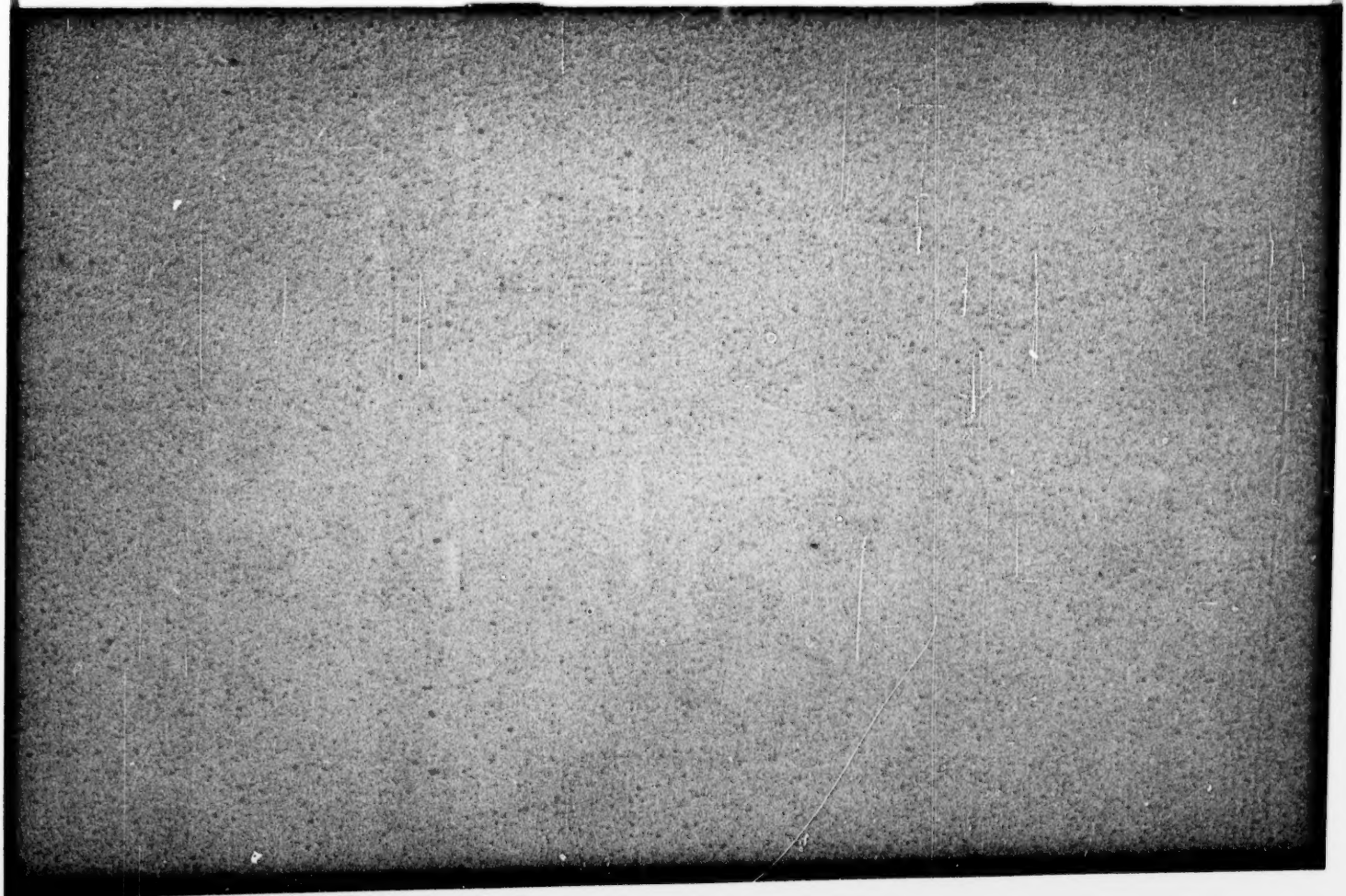
Upon consideration, it is hereby ordered that Norton G. Forbes and Thomas J. Mahoney, Jr. of Pierce, Ranitz, Berry, Mahoney & Forbes are substituted as attorneys in the above-captioned case.

/s/ Joseph R. Moss
Joseph R. Moss, Chief Justice
For the Court

York, S. C.
~~Sumter, S. C.~~

October 4, 1974.

CERTIFIED TRUE COPY
Clerk, S. C. Supreme Court



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-416

JOE FRANK MATARAZZO,
Petitioner

vs.

THE STATE OF SOUTH CAROLINA,
Respondent

APPENDIX

MORTON G. FORBES
THOMAS J. MAHONEY, JR.
JOHN F. M. RANITZ, JR.
Post Office Box 786
Savannah, Georgia 31402
Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

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207 S.E. 2d 93

THE STATE
Respondent

v.

JOE FRANK MATARAZZO,
Appellant

No. 19864

SUPREME COURT OF SOUTH CAROLINA

Luke N. Brown, Jr., J. Harold Mayer, Jr., Ridgeland and Alexander L. Zipperer, III, Smith & Portman, Savannah, Ga., for appellant.

Sol. Randolph Murdaugh, Jr., and Asst. Sol. Randolph Murdaugh, III, Hampton, for respondent.

BUSSEY, Justice:

At the June, 1973, term of the Court of General

Sessions for Hampton County, the appellant Matarazzo was convicted of the offense of possession of a controlled substance (marijuana) with intent to distribute the same. He appeals from his conviction and resulting sentence to a two year term of imprisonment. He states and argues four questions on appeal and we shall first consider his contention that the evidence in the case was insufficient to support his conviction.

It is elementary that in deciding whether the court erred in failing to direct a verdict in favor of a defendant in a criminal case the appellate court is required to view the testimony in the light most favorable to the State. When a motion for a directed verdict is made the trial judge is concerned with the existence or nonexistence of evidence, not with its weight, and although he should not refuse to grant such motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury, if there is any evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. See numerous cases collected in West's South Carolina Digest, Criminal Law.—741(1), 753(2).

We acordingly review and state the evidence in the light most favorable to the State. Appellant, then 20 years of age, in February, 1973, rented a trailer which became his abode in Hampton, South Carolina. Before coming to Hampton he had been a resident of Savannah, Georgia for the previous 16 years. He was employed by the Georgia-Pacific Company working on a job from late afternoon until about 2:30 A.M., five days a week. Living in appellant's trailer with him was one Russell Curl, age 19, a former employee of

appellant in forestry work, and a 14 year old Negro boy, one Willie Mays. Neither Mays nor Curl were employed at the time of the alleged offense, both being non-paying guests in appellant's trailer home.

On Friday night, April 27, 1973, five law officers including the Chief of the Hampton Police Department, acting on information from an informant, went to the appellant's trailer, knocked upon the door and were invited in. As the officers entered there were eleven persons in the living room of the trailer, Curl, Mays, and nine others who ranged in age from 13 to 18 years. A warm pipe was lying on the living room foor and the officers, one or more of them being familiar therewith, smelled burning marijuana. The appellant was at work and not present at the pot party. Curl who was known to the officers as an occupant of the trailer was promptly arrested. Mays, not known to the officers to be an occupant of the trailer, was later arrested as was the appellant.

The officers were armed with a search warrant, later ruled to be invalid, and in the course of a search of the trailer they found three bags of marijuana in the bathroom under the bathtub and a fourth bag underneath the couch in the living room near the spot where the pipe was found. Upon a motion to suppress, the three bags of marijuana found in the bathroom were excluded from the evidence, with only the bag found under the couch being admitted into evidence. There was other evidence, however, as will hereinafter appear, that four bags of marijuana were in the trailer at the time of Curl's arrest. These four bags had been in the trailer for several nights and their presence therein was known to the appellant. Both Mays and

Curl testified that appellant knew of the presence of the marijuana, but denied that such was the property of the appellant. At one point, however, Mays in response to a leading question by the solicitor testified to the effect that the marijuana was the property of all three occupants of the trailer. At least one sale of $5.00 worth of marijuana was made by Willie.

The nine teen-agers who were attending the pot party as guests when the raid occurred were known to, and friends of, all three occupants of the trailer. The circumstances reflected by the evidence give rise to the inference that this was not the first party to be held at the trailer. At some time prior to the night of the raid, the chief of police went to the trailer and removed therefrom two 13 year old girls. Appellant was admittedly present at that time but contended that he was asleep and didn't know what the girls were doing there. Appellant admitted that he knew parties had taken place at his trailer but denied any knowledge that they were pot parties or that any children were participating therein.

Ordinarily articles in a dwelling are deemed to be in the constructive possession of the person controlling the dwelling. See 22A C.J.S. Criminal Law § 597, p. 379. See also the annotation in 91 A.L.R.2d 810, dealing particularly with possession and/or constructive possessing in drug cases. There is abundant evidence, we think, to prove at least constructive possession of marijuana by the appellant and indeed his brief tacitly so concedes. Viewing the evidence in the light most favorable to the State we conclude that under all of the circumstances a fair and logical deduction therefrom is that such possession on the part of the appel-

lant was with the intent to participate directly or indirectly in the distribution thereof. It follows that the trial court correctly denied appellant's motion for a directed verdict of not guilty.

Appellant next contends that the trial court erred in refusing to suppress and exclude from the evidence the smoking pipe and the one package of marijuana which was found underneath the couch. It is argued that the seizure of such evidence was illegal for two reasons: (1) that probable cause for arrest was nonexistent, and (2) the seziure of these articles did not result from a search incident to a lawful arrest but was the direct result of a general search of the premises in the course of the execution of a void search warrant. The record discloses that neither of these contentions was presented to the court below and accordingly they may not be appropriately raised for the first time on appeal.

It is true that counsel for appellant in his motion to suppress sought to suppress all of the evidence, but discussed what portion of the evidence, if any, might under the law be admissible because discovered and seized in the course of a search incident to a lawful arrest. In summing up his contentions, counsel conceded that the court might find that there was a valid search, incident to a lawful arrest and moved that in the event of the court so finding, all evidence not found in the room of the arrest be supressed. Thereafter the court heard, at length, evidence for the State as to the circumstances surrounding the arrest of Curl and the search of the apartment; no evidence being offered by the appellant. The court then ruled that the search warrant was invalid and further ruled that the mari-

juana found in the bathroom would be excluded, but that the evidence seized in the living room, the point of arrest, would be admitted. While His Honor did not so expressly state, it is obvious that after hearing the evidence, His Honor concluded that here was a lawful arrest of Curl and, incident thereto, a lawful search of the room in which the arrest occurred. We add that the record rather clearly shows that his conclusion in this respect was correct. Counsel for appellant, after hearing the evidence and the ruling, was obviously satisfied therewith and interposed no further objection to the pipe and one bag of marijuana found in the room of arrest. He not only did not object, but expressly stated that he had no objection thereto.

Appellant next contends that the court erred in allowing testimony concerning the three bags of marijuana which had already been ordered suppressed. Without any reference to the search by the officers, Willie Mays and later Curl, testified that there were four bags of marijuana in the trailer at the time of the raid by the officers.

There are a number of reasons why appellant's contention in this respect is totally without merit. The testimony of Mays was objected to, but he was thereafter cross-examined by appellant's counsel without any reservation of rights under the objection. No objection was interposed to the testimony of Curl. He does not now assert error as to the admission of the testimony of Curl, the crux of his contention being simply that but for the illegal search of the premises, Willie Mays would never have been arrested and his incriminating testimony as to the existence and quantity of marijuana never been made available to

the State. In brief, such testimony, was the fruit of "the poisonous tree." The shortest and simplest answer to this contention is that such was never made to nor passed upon by the court below.

The record shows that when Mays was asked how much marijuana was in the trailer that night he responded, "I guess it was four bags." Counsel objected stating simply that the allowance of such testimony would defeat the entire purpose of the exclusionary rule, the three bags of marijuana found under the invalid search warrant having been previously suppressed. The court ruled, in effect, that the invalidity of the search warrant would not prevent the State from proving through an independent source, if it could, the quantity of marijuana in the premises at the time. Counsel did not even suggest to the court the possibility of the testimony of Mays being other than from an independent source. Even had the issue, which he now raises, been precisely raised when the testimony of Mays was objected to, the record is insufficient to support appellant's present contention. The record does indicate that the State had available considerable evidence against Mays other than any marijuana found as the result of an invalid search warrant. Most probably only Mays himself knows, and the record does not show, exactly why he decided to plead guilty and testify for the State.

In this same connection, in the course of the examination of Mr. Layton, a chemist for SLED, the solicitor asked and Mr. Layton answered a question as to the approximate weight of four packages of marijuana similar to the one package which was in evidence. Upon objection by counsel the jury was excused. Counsel

then, and for the first time, contended to the court that any testimony as to four bags of marijuana would under the circumstances of the case be the fruit "of the poisonous tree" and accordingly excluded under the principles enunciated in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441. The solicitor agreed not to pursue this line of questioning with Layton, following which the court ruled the question out of order. Counsel for appellant then moved for a mistrial on the ground that there were several references to the four bags of marijuana, which were so prejudicial to his client as to require a mistrial. No request was made for any further or precautionary instruction with respect to the objection made to the testimony of Layton and sustained by the court. Neither was there a motion to strike any of the evidence as to the four bags.

The motion for a mistrial was properly denied. Mr. Layton was the last witness for the State and even assuming, without at all deciding, that the objection to his testimony was meritorious, such was sustained. At that stage of the trial two witnesses had already testified, without any proper objection thereto, that there were in fact four bags of marijuana in the trailer. Moreover, the record does not reflect, we think any meritorious ground for excluding such evidence even if timely objected to.

Finally, the appellant argues that he is at least entitled to a new trial because of alleged prejudicial remarks of the solicitor to the jury in the course of argument. This contention is clearly without merit. The records show that in only one instance did counsel for appellant object to any remark by the solicitor which

objection was sustained, the court instructing the jury to disregard the remark objected to.

We conclude that all of the appellant's objections are without merit and the judgment below is accordingly.

Affirmed.

MOSS, C. J., and LEWIS BRAILSFORD and LITTLEJOHN, JJ., concur.

THE SUPREME COURT OF SOUTH CAROLINA

The State, Respondent,

v.

Joe Frank Matarazzo, Appellant.

ORDER

Attorneys for appellant have filed Motion for Stay pending a final determination of an appeal to the United States Supreme Court. It is therefore ordered that the remittitur in this case be stayed an dthe execution the remittitur in this case be stayed and the execution of the sentence of the appellant be stayd for a period of ninety (90) days from July 17, 1974. Upon receipt of notice from the Clerk of the United States Supreme Court that an appeal in behalf of the appellant has been docketed in that Court the stay shall continue until the final disposition of the case by the Supreme Court of the United States.

Joseph R. Moss,
Chief Justice For the Court

Columbia, South Carolina
July 29, 1974

CERTIFIED TRUE COPY

Frances H. Smith
Clerk, S. C. Supreme Court

STATE OF GEORGIA

CHATHAM COUNTY

Before the undersigned Notary Public, an officer authorized by law to administer oaths, came and appeared THOMAS J. MAHONEY, JR., who being sworn says:

Affiant is an Attorney at Law, admitted to practice in the Courts of South Carolina and Georgia, including the Supreme Court of South Carolina.

Affiant has requested the Clerk of the Supreme Court of South Carolina to furnish a certified copy of the record in the case The State v. Joe Frank Matarazzo for use in this petition for writ of certiorari.

Thomas J. Mahoney, Jr.

Sworn to and subscribed before
me this 8th day of October, 1974.

C. Annette Brigdon
Notary Public, Chatham County, Georgia

THE SUPREME COURT OF SOUTH CAROLINA

The State — Respondent,

v.

Joe Frank Matarazzo, — Appellant.

ORDER

Upon consideration, it is hereby ordered that Morton G. Forbes and Thomas J. Mahoney, Jr. of Pierce, Ranitz, Berry, Mahoney & Forbes are substituted as attorneys in the above-captioned case.

(s) Joseph R. Moss
Chief Justice For the Court

York, S. C.
October 4, 1974

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Francis H. Smith
Clerk, S. C. Supreme Court

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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-416

JOE FRANK MATARAZZO, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of South Carolina is reported at 207 S. E. (2d) 93 (1974) and is set out in Appendix of Petition.

JURISDICTION

Respondents do not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I

Whether the trial court and the Supreme Court of South Carolina violated Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution by ruling that one (1) bag of marijuana, found in the Petitioner's mobile home, was admissible into evidence at Petitioner's trial?

II

Whether the trial court and the Supreme Court of South Carolina violated Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution by ruling that testimony concerning three (3) bags of marijuana, all of which had been excluded pursuant to Petitioner's pre-trial suppression motion, was properly permissible at Petitioner's trial?

STATEMENT

The Petitioner is seeking a writ of certiorari to review the judgment of the Supreme Court of South Carolina entered July 17, 1974, affirming Petitioner's conviction and sentence to hard labor for two years by the Court of General Sessions of Hampton County, South Carolina. Timely Notice of Intention to Appeal was filed with the trial court.

The Petitioner was arrested on April 30, 1973, and was indicted on June 4, 1973, along with one Willie Mays and one Russel Curl, and charged with the offense of possession of a controlled substance (marijuana) and the offense of possession of a controlled substance (marijuana) with intent to distribute same.

On June 4, 1973, the Petitioner made a pre-trial motion to suppress certain evidence in the case. That motion was granted, the following day, as to three (3) bags of mari-

juana which had been seized from the Petitioner's mobile home. The motion was denied as to a fourth bag and a smoking pipe which were also seized from Petitioner's premises.

The Petitioner was then brought to trial alone on both counts of the indictment. Both of his co-defendants chose to plead guilty at the last moment. He was convicted on both counts and, upon instruction of the trial court, the jury modified its verdict to find the Petitioner guilty of possession of a controlled substance (marijuana) with intent to distribute same. Petitioner's motions for a Judgment Notwithstanding the Verdict and for a New Trial were denied and Petitioner was sentenced to imprisonment for a period of two (2) years.

ARGUMENT

I

The trial court and the Supreme Court of South Carolina did not violate the Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution by ruling that one (1) bag of marijuana, found in the Petitioner's mobile home, was admissible into evidence at Petitioner's trial.

The Petition raises an issue concerning the seizure of one (1) bag of marijuana from under a couch in the living room of Petitioner's mobile home. The facts of that seizure and the search that preceded it are as follows:

The Hampton police department received information to the effect that there was a supply of marijuana on the premises of the second trailer in McGowan Trailer Park in Hampton, South Carolina. This trailer was known to the police to be occupied by the Petitioner herein, one Russel Curl, and one Willie Mays. (T.R., p. 27, line 11—p. 28, line 2.) On Thursday, April 26, 1973, the police arranged

for an undercover agent to go to this trailer and buy some marijuana. The "buy" was made and the next morning the police obtained a search warrant for Appellant's mobile home. (T.R., p. 28, lines 3-22.) That night, they sent their undercover agent back to the Petitioner's trailer to make another buy. He was told by Russel Curl that the marijuana was in the trailer but that the agent would have to wait until Willie Mays' return to make a buy. (T.R., p. 30, lines 5-25.)

The police then went to the trailer and knocked on the front door. Someone inside said, "Come in" and then opened the door for the officers. Upon entering, the officers observed a smoking pipe in the center of the living room floor (They had previously been informed that a pipe was being used for marijuana smoking in this trailer) with some eleven (11) youths gathered thereabout. There was a noticeable odor of marijuana in the room. (T.R., p. 30, line 5—p. 31, line 17—p. 35, lines 13-14—pp. 55-56.)

Immediately upon being allowed entry to the room, the officers read their search warrant to Curl. (T.R., p. 34, lines 8-9.) Contrary to the allegations on page 13 of the Petition, the record indicates that Curl was placed under arrest at this time—shortly after the pipe was seen and at the time the search warrant was read. (T.R., p. 36, lines 4-14.) The police then searched the trailer and found three (3) bags of marijuana in the bathroom and a fourth bag under the couch in the living room some 3-4 feet from the pipe. (T.R., p. 32, lines 7-24.)

Prior to trial, the Petitioner moved to suppress the pipe and all four (4) bags of marijuana seized in the course of the search. The trial court ruled that the search warrant was void, for reasons not pertinent to this Petition, and excluded the three (3) bags which had been found in the bathroom from evidence. The fourth bag, the one found

under the living room couch, was ruled to be admissible as was the pipe. (T.R., p. 8, line 24—p. 49, line 10.)

During the trial on the issues, the pipe and subsequently the bag of marijuana were admitted into evidence. On both occasions the trial court specifically asked counsel for the Petitioner if there were any objections. On both occasions, counsel for the Petitioner specifically stated that there were none. (T.R., p. 56, line 3—p. 57, line 15.)

Petitioner's contentions concerning the admissibility of this bag are twofold: (1) He contends in Question I that his rights under the Fourth and Fourteenth Amendments were violated by the trial court in allowing this bag to be introduced into evidence and by the Supreme Court of South Carolina in affirming the trial court's action (Petition, pp. 12-14); (2) In Question III, he contends that the issues raised by his first contention were properly preserved in the trial court for review by this court. (Petition, pp. 19-20.)

The Respondent, answering these contentions in reverse order, will show: (A) That by stating that he had, "no objection," to the admission of the bag into evidence, the Petitioner waived his objections thereto; and (B) That, even if the Petitioner's objections are properly preserved for review by this Court, the bag was lawfully seized in a search incidental to arrest and was properly admitted into evidence.

A. **The Petitioner has waived his objections to the admissibility of this bag of marijuana.**

The Petitioner recognizes that this Court, in *Mapp v. Ohio*, 367 U. S. 643 (1961), held that when a State criminal conviction is challenged as being constitutionally impermissible, because of the admission of evidence obtained through an illegal search and seizure, State procedural requirements concerning assertion and persistence of direct

and collateral constitutional challenges to criminal conviction must be respected.

He contends, however, that he met the South Carolina procedural requirements by raising the exclusionary rule issues in his motion to suppress, thereby making an objection at the time the evidence was offered at trial unnecessary and preserving the constitutional issues raised by his motion to suppress.

Neither the Respondent nor the Petitioner (apparently, since no cases are cited in the Petition) has been able to find authority among the various state supreme court decisions to support the Petitioner's position. Respondent has, however, found several cases which are diametrically opposed thereto.

In *Robertson v. State,* 94 Fla. 770, 114 So. 534 (1927), a Florida case, the court held that the defendant had to object at trial to the introduction of evidence that he had sought to suppress by pre-trial motion in order to preserve his objection for appeal. The Missouri Supreme Court, in *State v. Lord,* 286 S. W. (2d) 737 (1956), held that, even though the defendant had made a pre-trial motion to suppress certain evidence allegedly seized pursuant to an unlawful search and seizure, she could not, on appeal, assert that the trial court erred in admitting that evidence when she did not object to the introduction thereof at trial.

The Maryland Supreme Court, in *Martelly v. State,* 187 A. (2d) 105 (1963), and the Georgia Supreme Court, in *Smith v. State,* 116 Ga. App. 45, 156 S. E. (2d) 380 (1967), have both held that failure to object at the time evidence is offered at trial is tantamount to a withdrawal of the pre-trial motion to suppress and acts as a waiver of the rights asserted thereunder. The Georgia decision, although possibly distinguishable on the facts, is particularly interest-

ing since trial counsel for the Petitioner was a member of the Georgia Bar.

It is instructive to note that, even under the "federal rule" in this area, given the facts of the instant case, Petitioner would have been held to have waived the objections asserted in his motion to suppress.

That rule, as defined in a line of cases beginning with *Cogen v. U. S.*, 278 U. S. 221, 73 L. Ed. 275, 49 S. Ct. 118, states that, generally, the denial of a pre-trial motion to suppress particular evidence preserves the point and renders it unnecessary to object again when the evidence is offered at trial. See also, *Gouled v. U. S.*, 255 U. S. 298, 65 L. Ed. 647, 41 S. Ct. 261; *Waldron v. U. S.*, 95 App. D. C. 66, 219 F. (2d) 37.

In *Lawn v. U. S.*, 355 U. S. 339, 78 S. Ct. 111, 2 L. Ed. (2d) 321, this Court recognized that the *Cogen* rule is not one of hard and fast application. In *Lawn*, defense counsel specifically stated that he had, "no objection," to the admissibility at trial of evidence he had opposed through a pre-trial motion. He was held to have purposefully and intentionally waived the points raised in his pre-trial motion.

The Respondent contends that the Petitioner in the instant case also waived his objection—and in precisely the same manner—when he stated, in reply to the trial court's query, "No, sir, we have no objection." (T.R., p. 57, lines 12-17.) He thereby indicated that he was satisfied with the court's pre-trial ruling. This interpretation of the record is even more convincing when one remembers that the Petitioner's motion to suppress was made in the alternative. Counsel urged: (1) that the search warrant was void and all the evidence should be suppressed; or (2) that, if a consent search or a search incident to lawful arrest were found, all the evidence found outside the living room be suppressed. (T.R., p. 25, lines 7-19.)

B. **The bag of marijuana was lawfully seized in a search incident to arrest.**

Petitioner argues that the police made a general search of the premises pursuant to their search warrant. Since the warrant was void, he insists that all four (4) of the bags of marijuana should have been suppressed.

It is Respondent's position that the bag in question was seized lawfully as the product of a search incident to the arrest of Russel Curl. In support of that position, the Respondent would respectfully note: (1) that there was sufficient probable cause to arrest Russel Curl; (2) that Curl's arrest was, at least, reasonably contemporaneous with, if not before, the search; and (3) that the bag was found within the proper scope of a search incident to arrest.

1. **There was sufficient probable cause to arrest Russel Curl.**

The record indicates the following:

1. An informer had advised the police that marijuana was being kept in a mobile home occupied by the Petitioner, Russel Curl, and Willie Mays (T.R., p. 27, line 11—p. 28, line 2);

2. A police undercover agent made a "buy" of marijuana at the aforesaid premises on April 26, 1973 (T.R., p. 28, lines 3-22);

3. The same agent was told by Russel Curl on the night of the search, April 27, 1973, that marijuana was on the premises and would be available for sale shortly (T.R., p. 30, lines 5-25);

4. The police were advised that a pipe was being used to smoke the marijuana (T.R., p. 35, lines 13-14);

5. The still-warm pipe was found on the floor of the trailer with what appeared to be marijuana ashes therein (T.R., p. 34, lines 16-23);

6. A group of eleven (11) youths were massed around the pipe (T.R., p. 31, lines 13-17); and

7. There was an odor of marijuana in the room (T.R., p. 55, line 25—p. 56, line 8).

From the foregoing, it is clear that the officers had reasonable grounds to believe that marijuana was being smoked on the Petitioner's premises in violation of Section 32-1519.49(b) of the 1962 Code of Laws of South Carolina, as amended. There was, therefore, probable cause to arrest Russel Curl. His arrest was legal.

2. **Curl's arrest was reasonably contemporaneous with the search.**

The Petition raises an issue as to whether the search took place after, or prior to, the arrest of Russel Curl.

The Respondent contends that the record clearly indicates that the arrest took place shortly before the search. (T.R., p. 36, lines 4-14.) The only other reasonable interpretation of the record is that the arrest occurred, at the very latest, a matter of moments after the search began. In either event, the arrest was "reasonably contemporaneous" with the search and, since probable cause to arrest existed prior to the search (as noted above), this was a valid search incident to arrest. *People v. Simons*, 290 P. (2d) 531 (Cal., 1955); *U. S. v. Collins*, 439 F. (2d) 610 (D. C. Cir. 1971).

3. **The bag was found within the proper scope of a search incident to arrest.**

The final issue arising from this search concerns the scope thereof. The record clearly shows that the location of the bag was within the proper scope of a search incident to arrest.

The basis for the "search incident to arrest" exception to the search warrant requirement is that it is reasonable, when an arrest is made, for a policeman to expect the

arrestee to use any weapon or to destroy any incriminating evidence which is within his grasp. Searches under such circumstances are limited to the area, "into which an arrestee might reach." *Chimel v. Cal.*, 395 U. S. 752, 763, 23 L. Ed. (2d) 685, 89 S. Ct. 2034; *Cupp v. Murphy*, 412 U. S. 291, 36 L. Ed. (2d) 900, 93 S. Ct. 2000.

The undisputed testimony was that the bag was under a couch, some 3-4 feet from where the marijuana pipe lay in plain view, in a room occupied by two (2) of Petitioner's co-defendants (one of whom was actually seated on the couch) and some nine (9) other persons. Since it was reasonable for the police to expect that either of the co-defendants (or any of the other nine (9) persons, for that matter) might reach behind the couch for a weapon or to destroy evidence, the bag was properly seized pursuant to a lawful arrest. (T.R., p. 32, lines 7-24—p. 57, line 4—p. 59—p. 30, line 5—p. 31, line 17.)

II

The trial court and the Supreme Court of South Carolina did not violate the Petitioner's rights under the Fourth and Fourteenth Amendments by ruling that testimony concerning three (3) bags of marijuana, all of which had been excluded pursuant to Petitioner's pre-trial suppression motion, was properly permissible at Petitioner's trial.

During the course of direct examination by the Solicitor, Willie Mays, the Petitioner's co-defendant, testified concerning three (3) bags of marijuana that had previously been suppressed by the trial court. Counsel for the Petitioner objected on grounds that it would be a circumvention of the exclusionary rule to permit such testimony. The trial court held that the invalidity of the search warrant would not prevent the State from proving through an independent source that the marijuana was present. The objection was overruled. (T.R., p. 65, line 22—p. 68, line 17.)

At no time did defense counsel argue, as he now argues in his Petition, that the Mays' testimony was "fruit of the poisonous tree," and/or that it was not obtained from an independent source.

Later in the proceedings, Russel Curl testified, without objection by Petitioner, concerning the same three (3) bags of marijuana. (T.R., p. 82, line 24—p. 83, line 2.)

The Solicitor also attempted to question one Grady Layton, the last State witness, concerning the suppressed evidence. Defense counsel objected: (1) on the basis that the exclusionary rule was being circumvented; and (2) on the basis that the testimony was "fruit of the poisonous tree." Counsel also moved for a mistrial on the same grounds. The trial court indicated that it was going to sustain the objection and the Solicitor agreed to withdraw the question. The motion for mistrial was denied. (T.R., p. 94, line 2—p. 98, line 10.)

The Petitioner argues that the action of the trial court in allowing Mays' and Layton's testimony and the affirmance by the Supreme Court of South Carolina violated his rights to due process and equal protection as guaranteed by the Fourth and Fourteenth Amendments and had the effect of nullifying the exclusionary rule as stated in *Mapp v. Ohio,* 367 U. S. 643 (1961) and "expanded" by the poisonous tree doctrine" of *Wong Sun v. U. S.,* 371 U. S. 471 (1963). (Petition, pp. 15-16.)

Although the Petition merely mentions, without discussing, the testimony of Grady Layton, Respondent will treat that testimony separately from the Mays' testimony.

A. **The testimony of Willie Mays.**

Respondent contends that, for both procedural and substantive reasons, Petitioner's constitutional rights have not been violated and he is not entitled to have his Petition granted.

1. **Procedural reasons.**

As noted in the discussion under Respondent's Question I, this Court, in *Mapp, supra,* recognized that, in preserving constitutional questions for review by this Court, State procedural requirements must be respected. The Petitioner in the instant case failed to respect those requirements in three particulars:

First, as to the testimony of Willie Mays, Petitioner never raised the issue that the testimony was fruit of the poisonous tree. Instead, he simply argued that testimony of this sort circumvented the exclusionary rule. The Court overruled his objections on that ground and held that the testimony fell under the "independent source" limitation to the exclusionary rule and was therefore admissible. Respondent contends that if Petitioner was aware of another theory under which the testimony could be excluded, it was incumbent upon him to advance that theory so that the trial court could rule thereon. Then, Petitioner could have appealed from an adverse ruling. In the instant case, this particular point was never ruled on by the trial court. It cannot therefore be properly asserted in the Petition. *Bailey v. Anderson,* 326 U. S. 203, 66 S. Ct. 66, 90 L. Ed. 3; *Jennings v. State of Illinois,* 342 U. S. 104, 72 S. Ct. 123, 96 L. Ed. 1539.

Secondly, the Petitioner failed to preserve his objection before cross examining Willie Mays at length on the same subject matter to which his objection was addressed. Under South Carolina law, such failure constitutes a waiver of the objection. *Goudelock v. Prudential Insurance Company,* 219 S. C. 284, 65 S. C. (2d) 114; *State v. Quillien,* .... S. C. ...., 207 S. E. (2d) 814.

Finally, Respondent would respectfully point out that any error by the trial court in permitting the Mays' testimony was cured by the fact that Russel Curl, subsequently

was allowed to testify to the same thing without objection on the part of the Petitioner.

Respondent believes that, for reasons cited above, the Petitioner did not meet the state's procedural requirements. The isues he raises in his Petition are not properly before this Court for review.

2. **Substantive reasons.**

There are also cogent and compelling substantive reasons why Petitioner is not entitled to a grant of Certiorari on the basis of Willie Mays' testimony.

Respondent contends that Mays' testimony was not "fruit of the poisonous tree." Instead, it fits under one of the recognized exception's to the exclusionary rule—the so-called "independent source" limitation.

This Court recognized, in *Silverthorne Lumber Company v. United States,* 251 U. S. 385, 40 S. Ct. 182, that facts learned as a result of information obtained in an illegal search and seizure do not become sacred and inaccessible by reason of such illegality. When knowledge of them is gained from an independent source, they may be proven like any others. The "independent source" rule was later somewhat expanded by the ruling in *Nardone v. United States,* 308 U. S. 338, 84 L. Ed. 307, 60 S. Ct. 266. That case held that, when the connection between the challenged evidence and the primary illegality is so long or tenuous that it can only be shown by sophisticated argument, the evidence is admissible since its exclusion would have no deterrent effect on the police.

The *Silverthorne* and *Nardone* rules mean, in the context of the instant case, that Mays' testimony would be admissible if: (1) there was no causal connection between the illegal search and that testimony; or (2) the causal connection was so attenuated that it could only be shown by sophisticated argument.

Respondent contends that there was no causal connection between the illegal search and the testimony. The record clearly supports that contention. It is obvious that the police knew of Willie Mays and had enough evidence to justify his arrest at a point in time prior to the illegal search.

Prior to that search, the police:

(a) knew that Mays, Curl, and the Petitioner lived together in a mobile home (T.R., p. 27, line 18—p. 28, line 2);

(b) had been informed that marijuana was present on the premises (T.R., p. 27, line 18—p. 28, line 2);

(c) had sent an undercover agent who made a "buy" from Mays on the premises (T.R., p. 28, lines 3-11); and

(d) knew that Curl had told the same agent that there was marijuana present in the trailer and that Mays would sell it.

Furthermore, Mays was sitting literally on top of the bag of marijuana that was seized incident to a lawful arrest. (T.R., p. 59, lines 8-21.)

It is clear therefore that the only way that the illegal search and the testimony could be linked is through "sophisticated argument" of the type discussed in *Nardone*. Under the rule in that case, Mays' testimony would still be admissible.

B. **The Testimony of Grady Layton.**

In reference to Layton's testimony, the Petitioner argues that: (1) his objection thereto should have been sustained; and (2) his motion for mistrial should have been granted.

As to Petitioner's objection, Respondent would simply point out that it was, in fact, sustained. The trial court ruled the question out of order and the Solicitor withdrew it. (T.R., p. 94, line 2—p. 98, line 10.) As a result, there is no adverse ruling by the trial court for this Court to review.

As to Petitioner's motion for a mistrial, it is clear that it was properly denied. Layton was the final State witness. Prior to his testimony, both Mays and Curl had testified, without proper objection, to the fact that there were four (4) bags of marijuana in the trailer. There was no request for precautionary instruction to the jury with respect to the objection made to the testimony of Layton and sustained by the Court, and there was no motion to strike any of the testimony as to the four (4) bags of marijuana.

CONCLUSION

For the foregoing reasons, Respondents submit that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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